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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re the Marriage of ILONA and
CARLTON LOEBER.

H035416
(Santa Clara County
Super. Ct. No. FL131896)

ILONA LOEBER,

Respondent,

v.

CARLTON LOEBER,

Appellant.

Ilona Loeber brought this family court proceeding for dissolution of her marriage to Carlton (Carl) Loeber. After a contested trial on issues of child custody and visitation, the court made an order, largely based upon the recommendations of a family court evaluator, granting sole physical and legal custody of the couple's two children to Ilona and granting limited visitation rights to Carl.¹ Carl appeals, asserting primarily that the trial court unduly limited his trial time, with the result that he was precluded from testifying. Although no respondent's brief has been filed, a thorough review of the record

¹ We refer to the parties by their first names for convenience, intending no disrespect.

persuades us that the trial court allowed him ample time to meet the issues before it, including by testifying on his own behalf, but that despite repeated advisements to the contrary he elected to present a series of witnesses most of whose testimony had little if any bearing on the issues actually before the court. We will therefore affirm the order.

BACKGROUND

This action originated in a domestic violence incident that occurred on October 14, 2005, after the parties had been married for about eight years. According to Ilona's testimony below, she was reading a book with the younger of their two daughters when Carl abruptly grabbed the girl and carried her to bed with such force that she started screaming. After he ignored Ilona's requests to leave the girl alone, Ilona hit him on the back. He then "came after [her]," "started choking [her] on [her] neck," and grabbed her arms with enough force to bruise her. He was eventually convicted, on a plea of no contest, of misdemeanor battery on a spouse. Meanwhile Ilona filed a request for a restraining order, which evolved into the present proceeding for marital dissolution. On November 30, 2007, the court entered judgment as to status only, dissolving the marriage as of August 29, 2007.

Although the parties have engaged in a great deal of litigation over property issues, we need only concern ourselves with the proceedings as they concern child custody and visitation. In early November, 2005, Jacob Weiner, Ph.D., conducted a preliminary screening evaluation. On November 15, the court made a temporary custody order conforming to Weiner's recommendations, granting sole custody to Ilona and supervised visitation to Carl. By August of 2006 Carl's visits were no longer supervised.

On June 5, 2008, the court signed an order for a partial custody assessment in anticipation of a permanent custody order. (See Fam. Code, §§ 3110-3112; Evid. Code, § 730; Cal. Rules of Court, rule 5.220.) The assessment was again conducted by Dr. Weiner, who eventually issued a 35-point recommended order proposing, in material

part, that (1) Ilona continue to have sole custody of the children; (2) both parents complete a “group for high conflict parents at The Center for Healthy Development”; (3) Carl have the children for specified hours on Tuesdays, Thursdays, Saturdays, and Sundays; (4) Carl also have the children for one uninterrupted week of vacation and one “Long Holiday Weekend” per year, but not otherwise have overnight visitation; and (5) he not seek any modification of these arrangements until he had furnished documentation of completion of 52 weeks of domestic violence counseling as ordered in the disposition of the criminal matter.

Ilona took exception to these recommendations in three main respects: She wanted the court to deny any overnight visitation; she wanted to have the children on alternating weekends; and she wanted to be able to take a vacation with them. Carl wrote that he would not oppose adoption of the recommendations “as written,” i.e., free of Ilona’s requested modifications. However, he went on to assert that he wanted a trial in order to counter the “false picture of the situation presented in Ilona’s statements.”

This was a theme which would pervade the proceedings. At a hearing on April 15, when it appeared that Dr. Weiner would be unavailable to testify in support of his recommendations, the court discussed with Carl the possibility of negotiating an agreed arrangement based on Weiner’s recommendations. Carl repeatedly expressed the desire to present evidence to refute “ridiculous” and “outlandish” accusations against him by Ilona and her counsel.

On June 1, 2009, Judge Chiarello set the matter for trial over Carl’s objection that Judge Persky was more familiar with the case. When the court asked the parties for time estimates, counsel for Ilona replied “[h]alf day,” but Carl replied “[s]ix days.” The court asked Carl how many witnesses he would have “besides Dr. Weiner,” to which Carl replied, “At least ten.” Asked who the witnesses would be, he said, “People that know me and the children in this situation; also an officer, other people that have direct

knowledge of the accusations that she's made against me." Counsel for Ilona asserted "that almost all of those witnesses will be irrelevant to the issues of custody and visitation." Carl again expressed the intention to address various "accusations" by Ilona, adding, "[T]here are all kinds of them, like I support the Taliban, like I abducted the children twice Like I took them to a nudist beach." Ultimately the court set the matter for a "full-day hearing," noting over repeated interruptions by Carl that he could request additional time from Judge Persky, who "will be here for the settlement conference."

Thereafter Carl repeatedly protested that the court was not allowing him enough trial time. At the settlement conference on August 10, 2009, when Judge Persky noted that Carl had half a day to present his case, he replied, "It's not going to happen in half a day. . . ." The court then inquired into how many witnesses Carl expected to call. Carl alluded to a list of witnesses he had submitted, adding that he wanted to call his children, two of their "playmate[s]," four of their teachers, and a police officer.² After a lengthy and repetitious colloquy, the court "tentatively" reaffirmed the one-day estimate while inviting Carl to make a further showing in writing.

² On August 6, Carl had filed a statement listing over 36 witnesses. For the most part it did not disclose the gist of the expected testimony. Certain witnesses, however, were expected to testify that "Ilona has had several auto accidents in the past two years," that she "started about ten courses at these colleges and then withdrew from all except one or two," that she "was prescribed a mood stabilizer . . . [which] [s]he was not taking . . . at all times," and that she "was hospitalized in 2001 as a consequence of not taking prescribed anti-biotics."

At the August 10 hearing, Carl additionally told the court that the children and teachers would testify in rebuttal of an anticipated assertion by Dr. Weiner that the children were afraid of their father. The police officer would testify, as later appeared, about an occasion when Ilona made a 911 call that Carl, and perhaps the officer, deemed unfounded.

Trial of the custody issues commenced on August 21, 2009, consumed that entire day, and was then continued successively to the morning, and then part of the afternoon, of September 8. Carl appeared in propria persona, but was assisted by Lyle Johnson, his former counsel of record. He called a number of witnesses, as described more fully below (pt. I(D), *post*), but did not testify on his own behalf.

On December 18, 2009, the court issued a proposed statement of decision in which it concluded that Carl's criminal conviction brought the case within Family Code section 3044 (§ 3044), which created a rebuttable presumption that the best interests of the children would not be served by granting him custody. The court found that he had failed to rebut the presumption, particularly in view of well-founded concerns about the soundness of his parental judgment. The court therefore adopted Dr. Weiner's recommendation that Ilona retain sole custody. The court rejected Carl's request for overnight weekends on the ground that he had failed to establish his fulfillment of any of the three conditions identified by Dr. Weiner, i.e., "1) Father needs to provide proof that he has completed a batterer's treatment program; 2) Father needs to complete the CHD [a group for high-conflict parents at the Center for Healthy Development]; and 3) the parents need to give family therapy 'a sincere try.'" The court went on to adopt the great majority of Weiner's recommendations as orally modified by Weiner at trial.

On February 9, 2010, the court entered its "final order re: custody and visitation after trial."³ The court "reiterate[d] its findings in the Proposed Statement of Decision" and the orders recited there with certain additional "clarifying orders."

³ Both this order and the preceding order for attorney fees are inexplicably absent from the clerk's transcript although they are clearly the orders targeted by Father's notice of appeal. They are before us only by virtue of our having directed the superior court to transmit its entire file to us.

On March 24, 2010, Carl appealed from the “final order filed Feb 9, 2010” and from an order of January 29, 2010, awarding attorney fees (see pt. II, *post*).

DISCUSSION

I. Insufficient Opportunity to Present Evidence

A. Claim of Error

Carl’s original brief contains some 33 unnumbered headings, and a further supplemental brief contains another 15. Most of these do not describe any claimed error as such but instead set out some assertion of fact or abstract proposition of law. Carl’s chief grievance, however, seems to be that the trial court allowed him too little time to present his case, thereby preventing him from testifying on his own behalf. He suggests that Judge Chiarello erred on June 1, 2009, when he set the matter for a one-day trial over Carl’s estimate that trial would require six days. He also implicitly faults Judge Perksy for failing to grant additional time—or more precisely, enough additional time—after trial was underway. We detect no error, either in the original estimate or in the court’s refusal to grant still more time after extending the trial by more than half a day beyond the original estimate.

B. Carl’s Focus on “Accusations”

Carl’s approach to this case, below and on appeal, has suffered from a basic misapprehension regarding the nature and purpose of a legal proceeding. The purpose of a legal proceeding is to resolve a concrete controversy, i.e., a disagreement between the parties as to their respective rights in regard to some matter as to which they both claim a legally protectable interest. The purpose of the proceeding before us was to determine who should have custody of the parties’ children and how visitation should be arranged. The first step in resolving those questions, as with any legal question, was to identify the factual and legal issues—the points of controversy—on which the resolution would, under guiding legal principles, depend. Once those issues had been identified, the

purpose of trial was to resolve them. In the course of such a trial, each party is expected to present evidence, legal authorities, and logical arguments that will support a determination of the dispositive issues in his favor.

Carl appeared unwilling or unable to conform to this model. He repeatedly expressed the intention to respond to various “accusations” he claimed Ilona had made against him in the past, whether or not they had any substantial bearing, or any logical bearing at all, on the issues. Both Judge Chiarello and Judge Persky attempted to dissuade him from this approach. Four months before trial—in trying to persuade Carl to forego a second custody evaluation made necessary by Dr. Weiner’s unavailability, as it then appeared, to testify—Judge Persky told Carl, “[Y]ou want essentially someone, perhaps the Court, to essentially vindicate you . . . [by making] some sort of finding that these things [that have been said about you] aren’t true.” But, the court continued, “[Y]ou have to ask yourself . . . is that what would happen in a custody and visitation trial? . . . [T]o answer that question, you have to look at what orders I would give I’m not in the practice of ruling on specific—[Interruption by Carl.]—allegations, so you’re not going to get an order that says he was a great dad his whole life and what she said in her pleadings wasn’t quite right, you’re just not going to get that.”

Carl professed to understand this, but immediately betrayed that he didn’t, or couldn’t, heed it. He expressed interest in the prospect of “witnesses, . . . transcripts, hard evidence, testimony from persons.” When the court asked, “To what end?” he replied, “Saying that those statements are false.” The court then observed that no one other than the parties was likely to see any transcripts, to which Carl replied, “I can order it and I can file it.” The court tried again: “What I hear you wanting is some vindication And my response to that is simply that I’m not sure that a custody and visitation trial, no matter if it went completely in your favor, would give you that vindication.” Carl, however, continued to be distracted by the very siren call against

which the court was warning him. He now launched into a protest about earlier testimony by Dr. Weiner—presumably at a hearing on his screening recommendations—“that I had quoted the bible to the children.” Shortly thereafter Carl asked whether, at a trial, he would “be able to, say, bring in ten witnesses?” The court said it depended on whether they would “offer relevant evidence.” Carl said, “Yes, that’s a question but you see all the nature of these allegations, these are serious allegations.” Then he denounced a statement by Ilona “that I kidnapped the children for two days.”

A shorter version of this exchange took place at the June 1 hearing at which Judge Chiarello set the custody trial for one day. Carl argued that the trial would take six days because he intended to address “all kinds of” accusations, “like I support the Taliban, like I abducted the children twice Like I took them to a nudist beach.” The court attempted to point out the inappropriateness of this approach, telling Carl, “If the accusations are not made at the hearing, they may not be raised,” and, “[T]he decision will be made based on the evidence at the hearing.”

These admonitions fell on deaf ears. At trial Carl devoted the lion’s share of his time, just as he had predicted, to supposed “accusations” by Ilona rather than to the issues actually before the court.

C. Ilona’s Case

By the time the question of custody/visitation came to trial, the three primary areas of dispute were (1) whether custody should be vested solely in Ilona or at least partly in Carl; (2) the extent to which Carl should be allowed overnight visitation with the children; and (3) whether Ilona should have the children without interruption on some weekends. The recommendations before the court, as modified in Dr. Weiner’s testimony, were that Ilona should have sole custody, Carl should have overnight visitation twice a year, and Ilona should have the children for the entire weekend on alternating weekends.

Carl bore the burden of proof on the first of these issues by virtue of his conviction for spousal battery, which required the court to presume that an award of custody to him would be detrimental to the best interest of the children. (§ 3044, subd. (a).) The presumption affected the burden of proof, i.e., it could “only be rebutted by a preponderance of the evidence.” (*Ibid.*) The statute prescribes several factors to be considered in determining whether the presumption has been rebutted, the first of which is whether the affected parent has “demonstrated that giving sole or joint physical or legal custody of [the] child to . . . [him] is in the best interest of the child.” (§ 3044, subd. (b)(1).) In addressing that question, the court cannot rely on the statutory “preference for frequent and continuing contact with both parents . . . , or with the noncustodial parent.” (*Ibid.*) In short, to prevail on the issue of custody Carl had to *affirmatively show* that granting sole or joint custody to him would best serve the children’s interests.

In addition to the statutory presumption, Dr. Weiner cited three further considerations supporting his recommendations. One was that Carl had a tendency to become so involved with one child that he failed to keep track of the other. Dr. Weiner cited observations by visitation supervisors that Carl “appear[ed] to have difficulty relating to both children at the same time, the effect of which is that he loses track . . . of the whereabouts of the child with whom he’s not relating.” He referred to the children’s own reports “that there were occasions [when] . . . one or the other of [the children] were lost during the course of a visit with father.” Ilona testified directly about these incidents, stating that there had been “numerous times” when Carl had “lost the children while they were in his care.” She said this had happened so many times that she had taught the girls specific strategies for remaining safe until she could arrive. In the typical case she would receive a call from the older girl saying “that basically she doesn’t know where Carl is.” Ilona would “drop everything . . . and . . . go to that place and try to find her, or I would

call the police and ask them to stand by with my daughters . . . until I will arrive and take them under my care.”

She described three specific incidents of this type. In one of them she arrived at a specified bookstore to find her daughter “sitting at the children’s section by herself, Carl was not around, and I couldn’t find [the younger daughter].” She and the lost daughter then found Carl in the parking lot teaching the younger daughter to ride a bicycle. On another occasion the older daughter called from a salad bar restaurant and said she didn’t know where Carl was. Ilona was at work and so called police and asked them to wait there while she clocked out. When she arrived, Carl was outside the restaurant playing jump rope with the younger daughter and an officer was inside with the older daughter. Ilona asked the officer to make a report, but he refused, saying “that we have to negotiate our time through the court.”

Dr. Weiner declined to predict as a fact that such incidents would be repeated in the future, but he “did think that that was a risk and not one . . . worth taking,” particularly in light of the section 3044 presumption. Asked why he was nonetheless recommending overnight visitation during a week-long vacation and a long holiday weekend, he replied that on those occasions Carl would presumably have “time set aside for the kids with no competing activities of his own, presumably he has activities planned for the kids. It seemed like a somewhat more controlled . . . situation in which he . . . could have a serious chance of succeeding. . . . I’m not here to take away overnight visitation from this gentleman, I would like to see him demonstrate that he can handle it, that’s all.”

The second consideration cited by Dr. Weiner consisted of doubts about Carl’s parental judgment “to the point that I would be concerned with [the children’s] staying overnight at dad’s home.” He ascribed these doubts to numerous reported incidents. First he cited an occasion when Carl took into his home a transient who then burglarized

it. In another incident, Carl had failed to seek medical attention after one of the girls had “hit her head on a brick wall and received quite a bump” during a diving lesson.⁴

It was also in the context of questionable parental judgment that Dr. Weiner cited Carl’s own report that he had repeatedly “used some physical force in getting the children to brush their teeth.” The chief effect of Carl’s cross-examination on this point was to confirm its accuracy and compound its adverse tendency by suggesting that a parent’s use of unnecessary force might be justified if the parent is “in a hurry” or “a bad mood.”

Dr. Weiner also relied on reports of “the domestic violence incident” in October 2005 “that occurred . . . with the minor children present.” He expressed concern that, despite the criminal court’s having ordered Carl to take a 52-week domestic violence course, “I have no evidence that he ever completed that.” He added that the requested proof had not been forthcoming despite his asking for it “multiple times.”⁵ He identified this as one of the “kinds of things” Carl might have done, but had not, “to overcome the rebuttable presumption that he should not have joint or sole legal or physical custody of the children.”⁶

⁴ Carl told the court he had a letter from a doctor stating that the resulting hematoma “did not require medical attention.” No competent evidence of this was ever presented, and as paraphrased by Carl the doctor’s statement was critically ambiguous. Insofar as it meant that the injury did not require medical *treatment* it seems largely off point. The question was not whether the injury required treatment but whether a prudent parent would, under the circumstances, seek medical *advice*.

⁵ Directing us to an exhibit to a declaration filed two years before trial, Carl asserts that Dr. Weiner and the court should have known that he had completed the course. But he never suggested to the trial court that the missing documentation was already in its (rather voluminous) file. On the contrary, he told the court, “I did do the 52-week, *though it’s not in evidence*.” On appeal he asserts that he “should have been able to testify about it.” As discussed below, no one prevented him from testifying on that or any relevant subject.

⁶ Dr. Weiner also cited “a subsequent violation of a restraining order involving firearms . . . that resulted in two days incarceration and an alteration on the length of his

Dr. Weiner also cited several examples of inappropriate statements or conduct toward the children. After learning that Ilona had undergone an abortion, Carl told one or both girls “that their mother had killed their little brother.” Carl admitted the essential accuracy of this report at the time of the screening, saying that he had “lost it.” One of the girls also told Dr. Weiner that during the original domestic violence incident, she had heard Carl say to Ilona, “ ‘Why don’t you go kill yourself.’ ”⁷

On another occasion Carl unilaterally removed one of the girls from her regular school and placed her in a Spanish immersion school. What struck Dr. Weiner about the incident was that “[t]here was no discussion with the child . . . [or] the mother. . . . [O]ne might argue the wisdom of putting a child in a foreign language immersion class. . . .

probation.” On appeal Carl briefly objects to this evidence because the court “refused to allow Carl to see” the underlying “CLETS” report. The court told him that the record itself was “restricted in terms of the dissemination” but advised that he had “some discovery options at your disposal.” The court added that it was “not going to base anything in [its] decision” on the report, which it had only examined in order to rule on Carl’s request to see it. The court further explained that while Carl might “otherwise have access to [it] because it’s your criminal history,” the copy in Dr. Weiner’s file was “released to Family Court Services under different statutes,” which restricted its dissemination. “So I think you can ask Dr. Weiner how that information affected his recommendation but I think we’re at the end of the road today as far as giving you more information about it.” Weiner went on to testify that the reported violation was “part of what I used to decide you had trouble complying with court orders and limit setting yourself.” The record contains a wealth of other evidence demonstrating this same tendency, making it virtually inconceivable that Dr. Weiner’s reliance on the report, by itself, had any effect on the outcome.

⁷ Other instances of arguably dubious parental judgment, reported by Ilona, included giving the girls currency in denominations up to \$100. On one occasion Ilona saw Carl give a bill to one of the girls and say, “ ‘Here’s the dollar, can you give me a hug?’ ” Dr. Weiner was unwilling to state categorically that such conduct would always reflect poorly on parental judgment, but he agreed that “money and affection should not go together, especially with limited visitation.”

[B]ut hey, it is a drastic change . . . to confront a kindergartner with and especially without some prior notice.”⁸

Carl’s failure to consult with Ilona or warn the child about this transfer illustrated the third consideration cited by Dr. Weiner: the parents’ inability to communicate about, let alone cooperate in, parental decision-making. He was “not convinced at all how prepared these people are, these parents are to work with one another in a joint custodial situation where presumably they would consult on major decisions.” He recommended family therapy to address this concern: “To say that Mr. and Ms. Loeber have a communication problem would be to understate matters substantially. . . . But they do need to learn to talk with one another, they are going to be these children’s parents for the rest of the children’s lives and for the rest of their lives and it’s not going to do the children any good to have a set of parents who simply can’t get along and have great mutual distrust and in many instances disrespect for one another’s opinions.”

D. *Carl’s Case*

The above summary outlines the case Carl had to meet if he had any hope of rebutting the statutory presumption and dissuading the court from following Dr. Weiner’s recommendations. But instead of addressing Dr. Weiner’s understanding of the facts or the reasoning he applied to them, Carl devoted his trial time largely to Ilona’s

⁸ Carl’s cross-examination about this incident served mainly to underline Dr. Weiner’s analysis. Carl asked if it would change the doctor’s opinion to learn that the child “was going to that Spanish school for two years and was doing well.” Dr. Weiner replied that “the way it influenced me . . . was the process. There was no discussion with [Mother], there was no discussion with [the child], it was here’s where you’re going to be going.” Carl asked why he “assume[d] there was no discussion,” to which he replied that this was what Mother had told him, and Carl had not said otherwise when Weiner discussed the incident with him. Instead Carl had sought to justify his conduct by saying that “at some point in your lives . . . you might move to a third world country.” Weiner “thought that kind of behavior was an indicator that you were not likely to be ready— [interruption by Carl]—for joint—[interruption by Carl]—custody.”

“accusations” and other matters having little if any tendency to cast doubt on the soundness of the recommendations. He opened his cross-examination of Ilona by alluding to a supposed accusation by her that he had behaved violently toward the children. The only intelligible testimony he secured on this subject was that she had never seen him strike the children. But there was no suggestion before the court that Carl had ever struck the children. There were allegations that he used inappropriate force, both in the October 2005 incident and in connection with the brushing of the girls’ teeth. And in cross-examining Dr. Weiner on the latter subject, Carl himself raised the possibility that he had used more force than necessary in connection with fastening one or both girls’ seat belts. To the extent these matters played a role in Dr. Weiner’s recommendations, however, it was as evidence that Carl lacked parental judgment, not that he posed a physical threat to the girls.

Carl’s case in chief, too, was devoted mostly to matters that had at best a remote bearing on the factors cited by Dr. Weiner. One recurring theme was what Carl described as Ilona’s “inordinate fear and . . . hypervigilance about child molestation.” So far as this record shows, she had never actually *accused* him of molesting either girl in fact but had only expressed anxiety over the *possibility* that something of that nature had taken, or might take, place. Carl nonetheless spent a good deal of his trial time on this subject. He asserted that Ilona had raised it in her “pleadings,” but the closest he came to identifying any such “pleading” was to assert in his pretrial statement that she had “made statements to [a] mediator . . . in 2007, as well as [to a psychologist] in 2008, about her fear of father molesting children.” Such extrajudicial statements were not “pleadings” by any definition. Carl’s own written submissions, on the other hand, contained many references to this subject.

The subject of molestation appeared to play no role in Dr. Weiner’s recommendations. He testified that Ilona “had a certain amount of anxiety about the

children being molested,” based at least in part on two distinct facts. The first was that the children reported being “taken to beaches where people were nude on two separate occasions.”⁹ The second was an occasion when Ilona found one of the girls striking “some sort of ballet pose” for Carl that Ilona found troubling. Weiner, however, attributed no “untoward motives” to Carl in connection with the ballet incident, and manifestly credited the children’s reports that they had not been inappropriately touched. Indeed Carl acknowledged at trial that the other side “apparently now [was] not saying anything about this fear of child molestation.”¹⁰

Despite this concession, Carl devoted a considerable part of his trial time to the subject. In addition to questioning Ilona and Dr. Weiner about it, he called two witnesses who he said would testify that Ilona had made accusations to them—or at least had expressed the definite belief—that Carl was molesting the children. Neither witness bore out this characterization; both testified consistently with Dr. Weiner’s testimony that Ilona had some “anxiety” on this subject. One described her as “worried about” the possibility that Carl was molesting the children. The other said Ilona reported being “afraid” that this was why Carl was “getting up at night . . . she was just kind of nervous about it.” Later he reiterated, “She was concerned about [you] getting up . . . in the middle of the night to check up on them. That’s all she shared.”

⁹ Despite Carl’s repeated denunciations of supposed “accusations” by Ilona that he had taken the children to “nudist beaches,” he made no attempt to controvert the children’s report that they had been taken to beaches where people were nude. Although that report came into evidence as hearsay, Carl lodged no objection to it. On this record it stands as uncontroverted evidence of the facts asserted.

¹⁰ Even farther afield was Carl’s questioning of Dr. Weiner about whether Ilona had told Weiner that Carl himself “was molested as a child.” Weiner acknowledged that one of the parents made such a report, but he was unwilling to attribute it to Ilona. Carl then conceded, “Okay, all right, that was me telling you,” and went on to describe the incident in somewhat further detail. His purpose in offering this evidence is opaque.

Carl spent much if not all of his trial time in a similarly ineffectual manner. His first two witnesses were called to testify about an occasion in 2004—before the parties had separated—when Carl took the girls on a weekend outing to Woodward Lake. He apparently hoped to elicit testimony that although Ilona had accused him of taking the girls on the trip without her knowledge, she had in fact known about the trip before he went. It is unclear that the testimony actually conveyed this point, but even if it had its relevance would seem extremely attenuated at best. Carl said that the testimony was offered to “show that . . . an accusation . . . was made against me, that I had, quote, kidnapped the kids for two days” But of course the fact that Ilona had “made” an “accusation” could have no relevance in and of itself. If Ilona relied on the accusation to support her position, or if it formed a basis for Dr. Weiner’s recommendations, then its truth or falsity would of course become a live issue. But her merely having made an accusation in the past, in and of itself, was supremely irrelevant.

We see no indication that anyone in the present proceeding, other than Carl, ever mentioned the Woodward Lake incident. Ilona’s pretrial statement contained an accusation that Carl had “kidnap[p]ed” the girls, but went on to describe an incident in 2007, three years after the lake incident, when Carl had taken the girls to Yosemite Park in violation of the temporary custody order then in effect. She testified that Carl had made no effort to inform Ilona of his intentions—that when she arrived at the girls’ school on Friday afternoon to pick them up, she discovered that Carl had already signed them out. Only when she called him did he tell her they were en route to Yosemite. When he brought them back on Sunday, he left them at the home of a friend and told Ilona to pick them up there.¹¹

¹¹ In what appears to be a critical mistranscription, the reporter’s transcript has Ilona testifying that Carl left the girls at “our friend’s house.” However, the person in question appears to be the same one later called by Carl to testify about Ilona’s demeanor upon picking up the girls. That witness testified that when Ilona arrived, she was “very

While the Yosemite trip possessed obvious pertinence to the issues at trial, the Woodward Lake incident did not. Carl described it as “similar” to the Yosemite one, and it may be true that Ilona accused him of similar conduct in both instances. But assuming the accusation was false in the 2004 case, that did not make it false in the 2007 case. Indeed, in pretrial filings Carl *admitted* having taken the girls “on a camping trip . . . to Yosemite.” Given this admission, the lake incident seems entirely immaterial. Conceivably a false accusation about that incident might offered to impeach Ilona’s overall credibility. But if offered for that purpose it would constitute impeachment on a collateral matter. Such evidence is no longer categorically prohibited. (See Cal. Law. Revision Com. com., 29B, part 2 West’s Evid. Code (1995 ed.) foll. § 780, p. 587 [statute operates to change former “inflexible rule of exclusion” to a “rule of discretion”]; cf. *People v. Mayfield* (1997) 14 Cal.4th 668, 748.) However, it is still generally frowned upon as an undue consumption of court time. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 327, quoting *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1033.)

Carl’s inability or unwillingness to address the real issues before the court was in further evidence on the second day of trial, which he commenced by calling two teachers to testify about his daughter’s performance in and adjustment to the Spanish immersion school. The question, however, was never placing her in the school was a good idea. Rather the incident was indicative of Carl’s unwillingness or inability to make important parenting decisions cooperatively, and to appreciate the impact his peremptory actions could have on his children. The testimony of the two teachers, who knew nothing about the circumstances of the girl’s enrollment, had no bearing on these questions.

mad because she doesn’t know who I am.” Thus the correct transcription of Ilona’s testimony is probably “a friend’s house,” i.e., a friend of Carl’s.

Next Carl called a dental hygienist who had recently treated one of the girls, apparently to show that the girls had poor dental hygiene under Ilona's care. This might at least be a relevant point, but Carl had failed to disclose this witness prior to trial, and counsel for Ilona successfully objected to the proposed testimony on that ground. After protracted discussion the court ruled that the witness could testify on what Carl called the propriety of "hold[ing] your child and brush[ing] their teeth when they're very young." The witness ultimately affirmed the intended point, albeit in the abstract: "I don't have children of my own, but . . . yeah, from what I've heard from other patients' parents for their children, they tend to have to, you know, go in and brush them themselves, but the child's too young to brush their own teeth." She had not heard the statement, suggested by Carl, that this approach was appropriate "until they're old enough to write their name." However she opined that "it depends on the child. If the child isn't doing a good job, then the parents, that's their obligation, to go in, floss and brush their teeth at any age."

Again the testimony barely touched the relevant question, which not whether a parent might sometimes have to brush a child's teeth but the *degree of force* that is necessary and appropriate to do so. Since Ilona had not testified about the tooth-brushing incidents, they were only before the court as a basis for Dr. Weiner's expert opinions.¹² Carl's witness did not contradict those opinions and could hardly have done so, since she knew nothing of the foundational facts, hearsay or otherwise, on which they rested. Carl might have placed himself on the stand and attempted to undermine Dr. Weiner's reliance

¹² In her pretrial statement Ilona described these incidents as follows: "Father physically restrains the children in order to make them brush their teeth. He would grab them and hold them so their arms were immobile and they were across his knee. He would roughly brush their teeth and the girls usually would cry after these incidents." Although this account was not in evidence, something like it was presumably relied upon by Dr. Weiner in concluding that the tooth-brushing incidents were another illustration of Carl's poor parental judgment.

on these incidents by showing that he only used a reasonable degree of force. Instead he called a witness who lacked the requisite foundation to testify on that subject.

More to the point were several witnesses whom Carl called to give their observations concerning his relationship with the girls. An acquaintance of 10 years, who had a daughter the same age as Carl's older daughter, testified that the girls had been friends since they were two or younger, that he had been with them maybe 200 times "going places, the beach, staying overnight," that he had stayed at Carl's house for a month, that Carl did many things for his children, that his children have a "great time with us," that the girls had never seemed afraid of Carl, that he had never seen Carl hit them or shout at them, and that he considered Carl a good father. Another witness, who had known Carl for about five years and who also had children who shared activities with Carl's, agreed that Carl was "a normal father" who "love[d] [his] kids" and "tr[ie]d to [do] the best for them." The supervisor at an after-school program testified that she had seen Carl come to pick up the girls many times. She would say their relationship with him was good. She would describe their relationship as "normal interaction."¹³

Carl also sought to cast doubt on Ilona's version of one of the reported incidents where he had "lost" one of the girls. He presented testimony from a police officer who had been present. Read most favorably to Carl, this testimony indicated that the officer received a report, originating with Ilona, that a child had been left unattended in a restaurant where the officer was dining. Carl was also present, presumably outside the restaurant, playing jump rope with three girls. The officer spoke to Carl and apparently determined that nothing was amiss. At some point Ilona arrived and spoke to the officer,

¹³ Carl made less headway with another would-be character witness. Asked, "What would you say about me as a father when you see me with my children," she replied, "You seem like a good father outside of I don't see you very much," adding, "I've seen you now twice in probably ten years or something, I don't know. Long time."

insisting that he write a police report. He refused, telling her “that I conducted my investigation and I determined that there was no crime committed, there was never any abandonment of any child.”

This incident was probably the same one described by Ilona in her direct testimony, though she said it took place in a Fresh Choice restaurant and the officer said it was a Sweet Tomatoes restaurant. But all this testimony really showed was that the officer did not find a reportable case of child abandonment. (See Pen. Code, §§ 271 [making it a crime punishable as felony or misdemeanor for parent to “desert[]” child “with intent to abandon it”], 271a [wilful abandonment of or failure to maintain child].) It remained undisputed that the child had called Ilona reporting that she didn’t know where Carl was. The accounts are easily reconciled by supposing that she had found him by the time Ilona arrived—and by the time the officer investigated. The testimony thus did little to cast doubt on Dr. Weiner’s premise that Carl had exhibited a pattern of focusing on one child to the point of losing track of the other.

Carl’s next witness was apparently the friend with whom he left the girls for Ilona to pick up after the 2007 Yosemite trip. (See fn. 11, *ante*, and accompanying text.) The witness said that when Ilona arrived, she was “very mad because she doesn’t know who I am.” The witness explained to Ilona that Carl had dropped the children with her “ ‘to help for waiting for you to come to take them home.’ ” Ilona replied to the effect that “Mr. Loeber is—does—no good,” and said “ ‘You don’t know Mr. Loeber, he . . . needs to be punished.’ ” Her angry demeanor upset the witness so much it made her cry. This took place in the presence of all of the children. On the other hand, the witness thought that only one of the children—her eldest—paid any attention.

Once again the intended purpose of the testimony is extremely obscure. Conceivably it was offered to show that Ilona felt malice toward Carl. It might also be offered as an instance of poor judgment on Ilona’s part, in that she indulged herself in an

emotional outburst and expressions of hostility toward Carl in the presence of the children. But the question before the court was not whether Ilona was an ideal parent. The question was whether Carl had overcome the presumption that he should not have custody, or had discredited some or all of the contested recommendations by Dr. Weiner.¹⁴

Near the end of his (extended) trial time Carl called Dr. Michael Jones, who he said had performed “a court-ordered evaluation, psychological evaluation of [Mother] and myself.” Carl asked Dr. Jones whether in his evaluation he had “determine[d] that I was a . . . threat to my children in any way.” Here again he was attacking a straw man, for there was no suggestion that any of Dr. Weiner’s recommendations rested on the premise that Carl was a “threat” to the girls, unless it was through absent mindedness or poor judgment. Dr. Jones did not answer the question broadly enough to reach those questions, however. He answered, “I didn’t feel that you were a threat to your children, *either molesting them or physically abusing them.*” He later acceded to the somewhat broader proposition that saw no “threat in [Carl] that would say that the children . . . should not be able to stay overnight at [his] house.”¹⁵ This testimony would indeed have

¹⁴ Carl may also have intended that this evidence depict Ilona as emotionally unstable, a trait he has seemingly imputed to her at various times. If that was his intent it might be understood to backfire, as such an intent would seem to be evidence of his impaired empathic abilities. A finder of fact could well ask what mother would *not* be upset to find that, after taking her children for the weekend without warning and in violation of a court order, her former husband has left them with a complete stranger—presumably to avoid a possible encounter with the police.

¹⁵ Carl then raised the molestation issue again, securing an acknowledgment that when the parties first came to Dr. Jones, *Carl* had told him “that the specific reason for coming and to have this evaluation [was] because [Mother] had accused me in mediation of fear of molesting, that’s why she was not allowing overnights.” But while acknowledging that Carl had said this, Dr. Jones took issue with it: “[Y]ou were coming because the family court made it an order that you come and see me for purposes of looking at psychological functioning and parental functioning. And one of the concerns that *you* had specifically was . . . that issue, of whether you had molested the children, but

supported a grant of more overnight visitation than Dr. Weiner was recommending, but it raised at most a conflict in expert opinion, which the trial court was fully entitled to resolve in favor of the latter.

E. Carl's Failure to Testify

Carl repeatedly alludes to his own failure to testify, for which he blames the trial court, and which he claims violated his right to due process as well as statutory rights governing family law proceedings. He never explicitly offered, requested, or demanded to testify, or indeed stated unequivocally that he had any intention of testifying. Without such a request, demand, or statement, we doubt that he has preserved any complaint on this ground for appellate review.

Assuming the complaint has been preserved, however, it is meritless. The trial court did not prevent Carl from testifying. He elected not to do so. The trial court made no secret of the amount of time available to present his case. He spent the vast majority of that time introducing evidence of very little, if any, consequence. If he had stronger evidence—such as his own testimony—it behooved him to present that evidence within the time allowed, while hoping to persuade the court to grant more time for the less important evidence. A party is not entitled to waste courtroom time on matters of no consequence and then, when his allotted time expires, demand that the real trial begin. The purpose of a trial is to address factual and legal issues of consequence in the determination of a concrete legal controversy. So far as this record shows, Carl had plenty of time to engage in that activity. He simply elected to spend it on matters largely peripheral to the issues before the court.

. . . that's not my understanding of why the Court necessarily—" (Italics added.) At that point Carl interrupted to ask whether Mother had brought up molestation during the evaluation. He replied only that one or the other of them had: "It was discussed."

It also bears noting that Carl's argument assumes that if more time had been allowed, he would have used it by taking the stand on his own behalf. Nothing before us substantiates that supposition. For all the record shows he would have used any additional time to present still more evidence that could not reasonably be expected to affect the outcome.

Carl's failure to testify must be viewed as the product of his own tactical choice, not judicial action. This distinguishes the present matter from the authorities cited by Carl. He repeatedly cites *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 (*Carlsson*), where the trial judge peremptorily terminated the trial in the middle of the husband's presentation of evidence. From the outset the judge had "manifested his impatience" with the husband's attorney and with "the pace of the proceedings." (*Id.* at p. 286.) Although the husband's attorney had "set the matter for two days," the court constantly threatened to declare a mistrial if it were not concluded in a day and a half. (*Ibid.*) The court itself wasted time on irrelevancies, ordering the husband to produce documents that it conceded were irrelevant to the matter, and threatening him personally with unspecified "penalties" in that regard. (*Id.* at pp. 286-287.) When counsel raised the possibility of a constitutional privilege in the materials, the court threatened to hold her in contempt. (*Id.* at p. 287.) When counsel asked to use the restroom after lengthy proceedings without a break, the court again threatened a mistrial. (*Id.* at p. 288.) At some point the court announced that a mistrial would follow if trial were not concluded by 4:30 p.m.. (*Id.* at p. 288.) Then, in the midst of husband's attorney's questioning of an expert witness in rebuttal, the court announced that it had received an application for a temporary protective order and that court was "in recess." (*Id.* at p. 289.) Although counsel held a brief discussion on the record, the judge did not return to the bench, and the reporter's transcript concluded with the notation, "'(At the hour of 4:29 p.m., the proceedings ended.).'" (*Ibid.*) Over husband's written post-trial objections, the court

ruled against him “on almost every issue,” including that of child support, which the court had previously said it would not determine until custody issues had been resolved.

The reviewing court found itself “compelled to agree” with the husband’s contention that the foregoing proceedings deprived him of due process. (*Carlsson, supra*, 163 Cal.App.4th at p. 290.) The trial judge had “openly violated” the fundamental precepts that a trial should be fair in fact, that it should appear to be fair, and that the court should keep an open mind until all the evidence was presented. (*Id.* at pp. 290-291.) The judge had “essentially r[u]n the trial on a stopwatch, curtailing the parties’ right to present evidence on all material disputed issues.” (*Id.* at p. 291.) He had used “the constant threat of a mistrial” to “pressure[]” the husband’s attorney “into rushing through her presentation and continuing without a break.” (*Ibid.*) And “[d]espite his avowed, compelling need for brevity, the judge himself frustrated the trial’s progression with a sua sponte order” compelling the production of documents “which, as the judge conceded, were not relevant to the issues before him. Most damning, the judge abruptly ended the trial in the middle of a witness’s testimony, prior to the completion of one side’s case and without giving the parties the opportunity to introduce or even propose additional evidence.” (*Ibid.*)

Citing and echoing *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*), the court held that a trial court’s infringement of the fundamental right to present evidence on a material issue will generally constitute reversible error unless covered by “such obvious qualifications as the court’s power to restrict cumulative and rebuttal evidence [citation], and to exclude unduly prejudicial matter.” (*Elkins, supra*, at p. 1357, quoting 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 3, pp. 28–29, quoted in *Carlsson, supra*, 163 Cal.App.4th at p. 292.) The court rejected the mother’s contentions, including that the husband had waived any due process violation by failing to “make a sufficient objection in the trial court or an offer of proof as to what additional evidence he would

have put on had the trial not been aborted summarily.” (*Carlsson, supra*, at p. 294.) The husband’s attorney “was not required to lodge formal objections or make offers of proof to a vacant bench,” and by describing additional evidence in a post-trial brief “did what he could to raise judicial error under extraordinary circumstances,” thus preserving the issue for appeal. (*Ibid.*)

On this basis the court reversed the judgment and remanded for retrial before a different judge. The case developed a certain notoriety, and led to disciplinary charges against the trial judge before the Commission on Judicial Performance, which ultimately imposed “severe public censure,” with two of the nine participating members voting to remove him from the bench. (Inquiry Concerning Judge Peter J. McBrien, No. 185, signed Jan. 5, 2010, typed opn. at p. 34 <http://cjp.ca.gov/res/docs/Censures/McBrien_01-05-10.pdf> [as of June 14, 2012].)

The proceedings below cannot be compared with the judicial reign of terror described in *Carlsson*. On the contrary, the court showed great indulgence and admirable patience in dealing with Carl’s insistence on litigating inconsequential matters. The court tried repeatedly to explain the basic concepts of materiality and relevance that should guide the development and presentation of his case, but he appeared entirely deaf to this advice, apparently because he viewed the trial as an occasion to vindicate himself and cast aspersions on his co-parent. Due process does not entitle a litigant to waste a half day of court time on insubstantial matters and then insist that the court permit him to move on to matters of more gravity—assuming, indeed, that this is something Carl intended to do, which is more than he communicated to the trial court.

Nor does this case bear any material resemblance to *Elkins, supra*, 41 Cal.4th 1337. The question there was the validity of a local rule generally requiring parties in dissolution proceedings to present their cases by written declaration. The father, who was self-represented, failed through his declaration to establish an adequate foundation

for much of the documentary evidence he sought to introduce, leading the trial court to proceed, in its words, “ ‘quasi by default.’ ” (*Id.* at p. 1345.) The Supreme Court invalidated the local rule as “inconsistent with various statutory provisions,” including the hearsay rule. (*Ibid.*, fn. omitted.) On that basis it reversed the order.

Carl has cited *Elkins* repeatedly, below and on appeal, for its discussion of the value of oral testimony in resolving controverted issues of fact, both in litigation generally and in family matters in particular. (See *Elkins, supra*, 41 Cal.4th at pp. 1357-1360.) But again, the court below did not curtail Carl’s ability to present oral testimony. It merely curtailed his ability to use up time on immaterial issues.

Carl also cites *Blumenthal v Superior Court* (2006) 137 Cal.App.4th 672, where the trial court declared a mistrial when the parties failed to conclude the presentation of evidence within the time allowed by the trial judge. The reviewing court wrote that “there are no *arbitrary* limits on trial time,” although “trial courts retain great power to prevent civil trials from taking more time than necessary.” (*Id.* at p. 683, italics in original.) It found the court’s deadline there “arbitrary,” explaining parenthetically that the trial “had consumed less than two court days, and there was only one witness left to call and only a few more hours left to go.” (*Id.* at p. 674, fn. omitted.) It also appeared that the judge’s refusal to continue the matter rested in part on her impending transfer to another department where, in the reviewing court’s view, she could and should have continued to hear the matter. (See *id.* at pp. 676-677, 680-681, 685-687.)

Here we cannot say that the trial court exceeded its power to prevent the unnecessary consumption of court time. It twice extended the time to accommodate Carl’s desire to present additional evidence, and it terminated the trial not to serve the court’s own administrative convenience but to conserve judicial resources for the benefit of other litigants waiting in the wings to resolve their own disputes. By the time the trial ended, the court had allowed Carl to squander enough of that resource. Nor did Carl say

or do anything that might suggest that he would use additional time, if granted, more effectively.

Carl cites Family Code section 217 (§ 217), which provides in part that in a hearing of the present type, “absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing.” (§ 217, subd. (a).) The court may find “good cause to refuse to receive live testimony,” provided it “state[s] its reasons for the finding on the record or in writing,” and considers factors prescribed by the Judicial Council. (§ 217, subd. (b).) The statute was enacted in 2010—after the hearing below had taken place—and, lacking a declaration of urgency, did not take effect until January 1, 2011. Carl asserts that it should be given retroactive effect because it is “remedial and procedural and reiterates *Elkins*.” This argument fails on at least two levels. First, assuming the statute applies retroactively in some sense, we would be extremely reluctant to hold that failure to conform to it could invalidate an order entered before it took effect. Second and more fundamentally, even if the statute had been in effect during the proceedings below, the trial court could not reasonably be understood to have violated it.

Section 217 was added to the code as part of an act including a lengthy uncodified declaration of legislative purpose. (Stats. 2010, ch. 352, § 1.) One goal of the act was to codify the “landmark decision” in *Elkins* disapproving local “barriers to litigants getting their day in court, particularly litigants who are unrepresented.” (Stats. 2010, ch. 352, § 1, subd. (b).) However the Legislature also recognized the heavy demands such cases place on the judicial system: “Family law cases involve an extraordinary range of issues, from the most simple, uncontested case with no children and no property to cases involving complex legal issues, highly personal and difficult conflicts over children, or serious issues of domestic violence and child safety. Unlike general civil, complex civil, juvenile, probate, and criminal cases, *family law is the last general jurisdiction in*

California that does not provide a procedure for the fair, timely, and efficient disposition of a case. The courts cannot manage limited resources efficiently, nor serve the best interests of California's families and children, without the ability to manage the flow of cases through the courts. Under the current system, the parties, who are most often self-represented, must take the initiative to obtain appropriate orders and judgments in a complicated judicial process that very few litigants can understand, and they often fail to take the next step toward completing the case. As a result, it is not unusual for family law cases to linger in the court for years. By eliminating the current ability of one party to drag out a case for years, the Legislature intends that all parties participate in, and benefit from, family centered case resolution.” (Stats. 2010, ch. 352, § 1, subd. (c); italics added.)

Nothing in the present record suggests that the trial court deprived Carl of his “day in court.” Due process requires only that a party be allowed the *opportunity* to be heard—not that he actually be heard. (See 3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 3, p. 31, citing *Goldstein v. Goldstein* (1963) 220 Cal.App.2d 369.) Carl had every opportunity to testify; he simply elected to present other, almost certainly less consequential, evidence. Nor was the trial court required to do more than it did to dissuade him from this course. He amply demonstrated, on the record, that he was stubbornly immune to such guidance. Under these circumstances the trial court was entitled, and indeed obliged, to “manage” its “limited resources efficiently” by restricting Carl to what it reasonably concluded was a sufficient time to present his case. Section 271 did not empower him, through the simple expedient of refraining from testifying, to extend that time and thereby impinge unnecessarily upon the interests of other litigants in the “fair, timely, and efficient disposition of [their] case[s].” (Stats. 2010, ch. 352, § 1, subd. (c).) As the Legislature declared, “Access to justice requires that parties be able to *appropriately* address the court and present their cases.” (Stats. 2010, ch. 352, § 1,

subd. (b); italics added.) Carl was given every reasonable opportunity to do that. If he chose not to employ it wisely, he must bear the responsibility for that choice.

No error appears in the court's management of the trial.

II. *Children's Testimony*

Carl complains about many other aspects of the proceeding below, perhaps most notably the court's ruling that the children would not be called to testify.¹⁶ Although he neglects to describe the pertinent proceedings below, let alone provide record citations, our own review discloses that Ilona's motions in limine included one "that the minor children be excluded from testifying, . . . citing Family Code Section 3042(b)." Carl objected that only the children could verify "a lot of things that have been stated as fact." The example he gave began by alluding to an statement by the older child, but then slid into a seemingly different subject: "[The girl] told me on the phone that if I said anything to anybody about something happening, like mom hitting her in the head with a book, or that they were—many times they were concealing where they lived when she moved a couple years ago. We'd drive by and [the older child] would try to say—tell me, 'Oh, it's over there,' and [the younger child] would tell her to be quiet, things like that." This supposed evidence of concealment illustrated, he believed, an effort by Ilona to "interrupt the relationship between the children and I," and constituted a violation of "court orders and statutes as far as where she was living." When prompted by the court, he also expressed the desire to have the girls testify regarding their "preferences," specifying that one of them had told him "go[ing] to Sunday school on Sunday morning . . . is her favorite time of the week to go sing the songs and go to her classes which she's gone

¹⁶ In his opening brief Carl raised this point somewhat obliquely by quoting at some length from the dissenting opinion of Justice Bedsworth in *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 386. His supplemental brief includes a section under the heading, "The court should not allow expert opinion that relies on statements of children unless the children testify."

to . . . every Sunday that was possible since she was born.” Implicitly, such a preference would weigh against Ilona’s request to have the girls on alternating weekends for the entire weekend.

Counsel for Ilona argued that Dr. Weiner had interviewed the girls for at least an hour each and could testify regarding what they told him about their preferences. Carl objected that Weiner was “not a judicial officer, he’s not . . . tasked, he’s not authorized to take testimony of witnesses.” He added, “The judicial officer is the one we elect, he should be the one that’s hearing the testimony . . .” He also complained that there was “no record of [Dr. Weiner’s] interviews with the girls,” there were no other witnesses to them, and they “were a year ago.” He alluded repeatedly to a case in which a child had been placed in her father’s custody only to be found later buried in his yard. He acknowledged that he did not “know if the girl . . . was allowed to testify in court before she was taken from her mother and given to her father.” He nonetheless suggested, a few minutes later, that the tragedy might have been prevented if “they” had “talk[ed] to the girl.”

The court ruled that it was not inclined to permit the children to testify as factual witnesses, and that with respect to their preferences “it is more appropriate to get that information through the court-appointed evaluator.” The court stated, however, that it would not “totally foreclose the issue”; it was ruling “subject to [Carl’s] further motion for additional input” regarding the children’s preferences, further explaining that Dr. Weiner would “testify subject to examination by both parties,” and that “if after that you feel that the child’s preferences have not been adequately communicated, it’s incumbent upon you to propose some additional solution.” It described some “other options that have been used in the past,” including meeting with the children, although it explained that even that procedure might “not be good for them.” Carl, again, did not simply accept the court’s ruling but felt impelled to contradict the premise that “being in your chambers

is any more threatening or a bad thing . . . than being with Dr., Weiner.” He referred again to the tragic case of the murdered girl. The court repeated that the parties would present such evidence as they chose about the children’s preferences, and that “[i]f after that you still feel that the . . . children’s preferences have not been adequately communicated to the Court, you may renew your motion.” It concluded, “We’re done with that, we need to keep going.” But Carl was not having it. He offered another argument to the effect that “the facts that [Dr. Weiner] says will be hearsay.”

At no time did Carl attempt to make the further showing invited by the court. Nor did he attempt to give his account of their preferences, either by testifying about their statements to him or by making an offer of proof as to what they would say if they took the stand (or were interviewed by the judge). Once or twice he alluded to factual propositions that, he asserted, only they could corroborate or refute, such as his taking them to “nudist beaches.” But of course he himself could testify to those matters if he chose to do so; and in any event he never made a plain, coherent demonstration of what he actually expected them to say.

Carl identifies no colorable error in the court’s actions. As noted above, he devoted little of his attention at trial to the question of what would best serve the girls’ interests but instead focused almost entirely on attempting to vindicate his own character and impugn Ilona’s on some more general level. If he felt the girls’ testimony was truly necessary to convey an accurate picture to the court on some material subject it was incumbent upon him to make a concrete demonstration to that effect, especially when the court had expressly declared its ruling tentative and invited Carl to “renew your motion.” No error appears in this regard.

III. *Supplemental Brief*

Carl filed a supplemental brief, with this court’s leave, in which he raises a host of objections to the procedures under which the matter was adjudicated. Announcing that

he “wants to change the system,” he challenges two newly enacted rules of court (Cal. Rules of Court, rules 5.1119, 5.250) as well as the whole regime of family court assessments under which, as he characterizes it, a “staff person” (i.e., a family services evaluator—here, Dr. Weiner) receives “unsworn and unrecorded statements” which the trial court “use[s] . . . as evidence at trial” He later complains of this procedure as a “secret deposition” at which “court staff” take testimony on which the court later relies. Describing Dr. Weiner as “both an expert and a lay investigator,” he asserts that he was “allowed to testify to hearsay as the basis of expert opinion based on the same commonly observable allegations he was allowed to testify to as a lay witness investigator.” He asserts that although “Weiner was wrong” about several matters, as enumerated in his opening brief, “it is difficult to prove error without a record and no one else present who can be examined.”¹⁷ He also complains that Weiner was paid \$4,000 by Ilona to testify at

¹⁷ The supposed mistakes by Dr. Weiner are: (1) he erroneously relied on the “CLETS” record as reflecting a firearms violation; (2) he misinterpreted a physician’s letter concerning the daughter’s bump on the head; (3) he failed to take note that the court’s own file contained a copy of a fax showing Carl’s completion of the 52-week batterer’s program; (4) he failed to provide any written summary of his assessment or explanation for his recommendations; (5) he “made a speculative and biased judgement when he said Carl was coaching the children because he asked them to read a portion of the Bible”; and (6) he “did not speak to anyone outside the family for his investigation, except Ilona’s current husband Gene Kozin.”

The short answers to these claims are that (1) the record does not establish error, much less prejudice, in connection with the CLETS record (see fn. 6, *ante*); (2) we see no evidence that Dr. Weiner’s recapitulation of the contents of the physician’s letter, to which Carl opened the door in cross-examination, was materially inaccurate; (3) Dr. Weiner could not be charged with knowledge of a two-year old declaration that Carl himself manifestly overlooked in telling the court he had no evidence of his completion of the 52-week course; (4) we see no objection below, and certainly no timely objection, based on the posited lack of written reasons, let alone any claim of surprise arising from it; (5) if Dr. Weiner misinterpreted Carl’s remarks to the girls, the remedy was to present evidence supporting a different interpretation, most obviously through Carl’s own testimony; and (6) the record suggests no reason to suppose that persons

trial. He contends that under the current procedure, the evaluator in effect “make[s] the decision” whether the court should speak to the affected child.

Much of Carl’s argument on these matters seems pervaded by the erroneous supposition that a litigant possesses a fundamental right to prevent his opponent from relying on hearsay evidence. This is true to some extent in a criminal prosecution, where the Sixth Amendment entitles the defendant “to be confronted with the witnesses against him.” (See Cal. Const. art. I, § 15 [“The defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant.”].) In civil cases, however, the admissibility of hearsay is governed entirely by statute and caselaw.¹⁸

In the absence of constitutional infirmity the matters of which Carl complains are addressed to the wrong branch of government. The “system” Carl “wants to change” is the creature of the Legislature, and unless it offends some provision of the state or federal constitution this court is powerless to change it.

IV. Attorney Fees

On September 30, 2009, Ilona filed a request for attorney fees and costs after custody trial. Carl filed written opposition, first in propria persona and then through Attorney Johnson. Ilona filed a declaration stating that she had incurred fees and costs of over \$52,000 in connection with custody and visitation issues. On January 29, 2010, the court entered an order awarding Ilona \$7,500 in pendente lite fees pursuant to Family Code section 2032 and \$2,500 in sanctions pursuant to Family Code section 271.

outside the family could have told Dr. Weiner anything that would have substantially altered his professional evaluation of the family.

¹⁸ It is of course conceivable that a case might arise where reliance on hearsay rendered the proceeding so fundamentally unfair as to effect a denial of due process. Nothing approaching this appears in the present record.

Carl’s notice of appeal includes the foregoing order, and he requests at several points in his brief that it be reversed. However these requests are unaccompanied by any colorable claim of error. His entire argument on the subject appears as follows: “In light of the errors made by the court’s investigator Weiner noted above, and mentioned in the hearing on attorney fees . . . and the complaints Carl was not allowed to bring to the notice of the court in his own testimony, Carl requests that the sanctions for attorney fees be reversed.” He makes no attempt to explain how “mistakes” by Dr. Weiner, particularly ones brought to judicial attention only after trial, could vitiate an award of fees. The second premise implied by the quoted argument—that he “was not allowed” to testify on his own behalf in opposition to Weiner’s recommendations—is simply untrue.

DISPOSITION

The orders appealed from are affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.